

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----- X
BENJAMIN PLAZA, JR.,

Index No.: 700053/2009

Plaintiff,

NOTICE OF MOTION

-against-

No Judge Assigned

MICHAEL HEILBRON,

Defendant.
----- X

PLEASE TAKE NOTICE that, upon the affirmation of Eric E. Rothstein, dated July 20, 2009, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at the Supreme Court of the Queens, at the Courthouse located at 88-11 Sutphin Boulevard, Jamaica, New York, in at IAS Part to be determined, on the 12th day of August, 2009, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order:

1. Granting plaintiff, BENJAMIN PLAZA, JR., a default judgment against defendant, MICHAEL HEILBRON, pursuant to CPLR 3215(g);
2. Setting this matter down for an Inquest on damages; and
3. For such other and further relief as appears just and proper in the circumstances.

Dated: New York, New York
July 20, 2009

Eric E. Rothstein

Eric E. Rothstein
Rothstein Law PLLC
Attorneys for Plaintiff
11 Park Place, Suite 1801
New York, New York 10007
(212) 385-8015

To: Michael Heilbron
30-18 88th Street
Flushing, New York 11369
(home address)

Michael Heilbron
c/o The Carlyle Hotel
Stewarding Department
52 East 77th Street
New York, New York 10021
(work address)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----- X
BENJAMIN PLAZA, JR.,

Index No.: 700053/2009

Plaintiff,

AFFIRMATION

-against-

MICHAEL HEILBRON,

Defendant.
----- X

ERIC E. ROTHSTEIN, an attorney duly admitted to practice in the Courts of the State of New York, and a member of ROTHSTEIN LAW PLLC, attorneys for plaintiff, BENJAMIN PLAZA, JR, makes the following statements, upon information and belief, under penalties of perjury; said statements being based on papers contained in the file maintained by plaintiff's aforesaid attorneys.

1. Plaintiff seeks a default judgment against defendant, MICHAEL HEILBRON, pursuant to CPLR 3215(g).

2. This action follows defendant's assault and battery on plaintiff on or about June 29, 2008. Plaintiff timely commenced this action on March 30, 2009, by filing a summons and complaint in Supreme Court, Queens County. Plaintiff filed the summons and complaint electronically via the Court's ECF program. A copy of the Summons and Complaint is attached as Exhibit A.

3. On June 12, 2009, within 120 days of commencement of the action, a licensed process server served defendant, MICHAEL HEILBRON, at his place of employment, The Carlyle Hotel, by delivering a copy of the summons and complaint to a person of suitable age and discretion. Thereafter, on June 15, 2009, the process server mailed a copy of the summons

and complaint to defendant's work address. In addition, on June 17, 2009, I mailed a copy of the summons and complaint to defendant at his home. Finally, on June 18, 2009, I filed the proofs of service with the Court via the ECF system. The process server's Affidavit of Service and my Affirmation of Service are collectively attached as Exhibit B.

4. Defendant's time to serve an Answer has expired and has not been extended. To date, defendant has failed to appear in the instant action. The instant application is made within one year of the default.

5. Plaintiff personally verified the Complaint (Exhibit A) which therefore serves as an affidavit of the facts constituting the claim and the amount due. CPLR § 3215(f).

6. Plaintiff's complaint has merit. Specifically, the complaint alleges, *inter alia*, that defendant assaulted and battered plaintiff. *Id.* Thus, the verified complaint alone is sufficient for the Court to grant plaintiff a default judgment.

7. However, plaintiff offers additional proof. Specifically, on February 5, 2009, defendant plead guilty to Assault in the Third Degree (Penal Law § 120.00), a Class A Misdemeanor, and was sentenced to a Conditional Discharge and five days of community service. Attached hereto collectively as Exhibit C are the felony complaint, a Certificate of Disposition, and the transcript from defendant's plea and sentencing.¹

8. Defendant's conviction of Assault in the Third Degree arising out of the same events as those alleged in this action established his civil liability for damages for assault and battery and collaterally estopps him from contesting liability herein. *Bazazian v. Logatto*, 299 A.D.2d 433 (2d Dept. 2002); *Costello v. Lupinacci*, 253 A.D.2d 478 (2d Dept. 1998).

¹ It appears that the Judge misstated the dated during the plea allocation. However, the time and place of the occurrence that the Judge referred to match those set forth in the felony complaint.

9. Accordingly, the Court should award plaintiff a default judgment against defendant and set this matter down for an Inquest on damages.

10. No prior application for the relief requested herein has been made.

WHEREFORE, plaintiff respectfully requests that the Court issue an order awarding him a default judgment against defendant, MICHAEL HEILBRON, scheduling an Inquest, and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
July 20, 2009

Eric E. Rothstein
Eric E. Rothstein

AFFIRMATION OF SERVICE

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

ERIC E. ROTHSTEIN, an attorney duly admitted to practice law before the Courts of the State of New York, being duly affirmed pursuant to CPLR § 2106, deposes and says:

I am not a party to the within action; I am over 18 years of age; I reside in New York, New York.

On July 20, 2009, I served a copy of the original **Notice of Motion** upon:

Michael Heilbron
30-18 88th Street
Flushing, New York 11369
(home address)

and

Michael Heilbron
c/o The Carlyle Hotel
Stewarding Department
52 East 77th Street
New York, New York 10021
(work address)

at the above address(es) by depositing a true copy of same, enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Service within the State of New York.

Dated: New York, New York
 July 20, 2009

Eric E. Rothstein
Eric E. Rothstein